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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 450

LOGAN LANES, INC.,	*Petitioner,*
VS.	
BRUNSWICK CORPORATION,	*Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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LOGAN LANES, INC.,
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BRUNSWICK CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
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for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 5, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in CCH 1967 Trade Cases, par. 72,091. A copy of the opinion is attached hereto as Appendix A. An unreported memorandum opinion was issued by the District Court for the District of Idaho. A copy of the District Court opinion is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is a discriminatory sale of recreational equipment to a State University for use in its Student Union Building exempt from the Robinson-Patman Act as amended by Section 13c (15 U.S.C. §13c) if that equipment is used in direct and open competition with private commercial establishments operating in the same locality?

2. Was the Court of Appeals correct in its conclusion that the degree of public use of recreational equipment on a university campus is immaterial in determining whether the purchase of that equipment falls within the "institutional" exemption of the Robinson-Patman Act?

3. Did the Court of Appeals, in affirming a Summary Judgment for respondent on the sole ground that a discriminatory sale of equipment to the Utah State University for use in its Student Union Building was exempt from the Robinson-Patman Act, improperly disregard the fact that petitioner charged respondent with other discriminatory sales to which no such exemption does or could apply?

4. Did the Court of Appeals improperly affirm a Summary Judgment for the respondent in this matter where the complaint properly charged violations of the federal antitrust laws and the Summary Judgment was granted without petitioner having been allowed any discovery in connection with those charges?

5. Was petitioner improperly denied its constitutional right to a jury trial on its antitrust claims against the respondent?

STATUTES INVOLVED

The statutory provisions involved are Section 2 of the Clayton Act, 38 Stat. 731, §2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, §1 (1936), 15 U.S.C. §13 (1952), and as further amended by 52 Stat. 446 (1938), 15 U.S.C. §13c (1964), and Section 4 of the Clayton Act, 38 Stat. 731, §4 (1914), 15 U.S.C. §15 (1952). These statutes are set out in Appendix C.

STATEMENT

Proceedings Below

This is an action for treble damages brought by petitioner against the respondent Brunswick ("Brunswick") for violations of the federal antitrust laws and more particularly for price discriminations prohibited by the Robinson-Patman Act (15 U.S.C. §13 et seq). (R. 4-13). Jurisdiction of the District Court was invoked under Section 4 of the Clayton Act (15 U.S.C. §15).

Petitioner commenced discovery proceedings against Brunswick by service upon it of extensive interrogatories and requests for admission of facts (R. 15-31). The requests for admission were directed to the sale of bowling and other recreational equipment by Brunswick to the Utah State Building Board for ultimate installation in the Student Union Building of the Utah State University. (R. 21-31). The interrogatories were not so limited, and sought

factual information on other sales by Brunswick in Utah and Idaho over the period 1958-64 (R. 15-19).

On the day Brunswick was to have answered petitioner's interrogatories and requests to admit, it filed a motion to dismiss and a motion for extension of time to answer those interrogatories and requests. (R. 34, 36). Petitioner then filed a motion for an order compelling Brunswick to answer the interrogatories (R. 38). Petitioner amended its complaint in certain particulars (R. 43-52), and Brunswick addressed a motion to dismiss to the amended complaint (R. 53). After hearing, the District Court denied petitioner's motion to compel answers, granted the motion of Brunswick for an extension of time to answer interrogatories *until ten days after a ruling on the motion to dismiss,* and granted the motion to dismiss, treating it as one for Summary Judgment pursuant to Rule 56, Federal Rules of Civil Procedure. (R. 65, 98-103). Appeal was then taken by petitioner from the Summary Judgment *and* from the discovery rulings of the District Court. (R. 105). Jurisdiction of the Court of Appeals was invoked under 28 U.S.C., Sections 1291 and 1294.

The Court of Appeals affirmed the Summary Judgment in favor of respondent Brunswick. (Appendix A). It sustained the Summary Judgment on the basis of the "university exemption" contained in Section 13c of the Robinson-Patman Act (15 U.S.C. §13c) and it therefore did not reach any question of governmental exemption. The Court of Appeals did not rule on the separate appeal taken by petitioner from the discovery orders of the District Court.

I. THE COURT OF APPEALS ERRONEOUSLY CONSTRUED THE "INSTITUTIONAL" EXEMPTION OF SECTION 13c OF THE ROBINSON-PATMAN ACT TO APPLY TO A DISCRIMINATORY SALE OF RECREATIONAL EQUIPMENT USED BY A UNIVERSITY IN DIRECT COMPETITION WITH PETITIONER'S PRIVATE BUSINESS.

A. Legislative History Demonstrates the Exemption Was Not to Apply in Competitive Situations.

Congress, in enacting the Robinson-Patman Act in 1936, intended that it apply in *all* instances where price discriminations were likely to cause substantial competitive injury. See S. Rep. No. 1502, 74th Cong., 2d Sess. (Jan. 16, 1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess. (March 31, 1936); and Report of Conference Committee, H. R. Rep. No. 2951, 74th Cong., 2d Sess. (June 8, 1936).

Congress was similarly concerned with competitive injury in 1938 when it passed Section 13c, the "institutional" exemption, by way of amendment to the Robinson-Patman Act. That section provides:

> "Nothing in sections 13-13b and 21a of this title, shall apply to purchases *of their supplies for their own use* by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." (Emphasis added)

The pertinent House and Senate Committee reports on the measure indicate an intent to extend the institutional exemption only so far as not to interfere with the over-all purposes of the Robinson-Patman Act in preventing anti-competitive price discriminations. In House Report No. 2161 of the Seventy-Fifth Congress, Third Session, issued on April 19, 1938, after a brief statement regarding the over-all purposes of the Robinson-Patman Act, the Committee reported:

> "The Committee does not feel that the wholesome purpose of the Robinson-Patman Act will be interfered with by the enactment of this bill to make certain that favors in price which are occasionally extended to eleemosynary institutions, because of the character of the institutions, do not fall under the ban of the Act."

Senate Report No. 1769, dated April 20, 1938, after similar statements regarding the general purposes of the Robinson-Patman Act, continued as follows:

> "The purpose of the Robinson-Patman Act, to prohibit price discrimination between purchasers in interstate commerce where competition would thereby be lessened, does not seem to apply as to eleemosynary institutions, as they are not operated for profit."

The legislative history of the Robinson-Patman Act itself demonstrates that sales to the government were intended to be exempted therefrom only to the extent that the goods purchased were used by the government for its own purposes and not in competition with private concerns. (See colloquy between members of Congress and H. B. Teagarden, chief lobbyist for the bill, *Hearings before the House Committee of the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess.* 208-9, 1935; the colloquy is attached hereto as Appendix D).

The clear congressional aim in passing both the Robinson-Patman Act and the "institutional" exemption thereto was to prohibit price discriminations in competitive situations and allow them, to a limited degree, in non-competitive situations.

The exemption was obviously a matter of grace, ostensibly provided for the benefit of nonprofit charitable institutions who could not compete, or for whom it would be detrimental to compete, with private enterprise for the

purchase of supplies presumably put to eleemosynary uses. In enacting this "institutional" exemption, Congress never envisioned that it would be used as a shelter by a discriminating seller or an institutional purchaser therefrom which, albeit non-profit in nature, is nevertheless in strenuous competition with private business.

B. The Exemption Has Not Previously Been Applied to Competitive University Facilities.

In the only previous case to consider the "institutional" exemption of Section 13c, the Court of Appeals for the District of Columbia held the exemption inapplicable to discriminatory sales of law books to "self-sustaining" campus book stores for resale at a profit. *Students Book Company v. Washington Law Book Co.*, 232 F.2d 49, 50 n. 5 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956). In that case, the favored book stores, just as the bowling lanes in the instant case, were university facilities. After a full development of the facts by discovery and jury trial, however, the Court found the purchases were non-exempt because the books involved were being resold as a general source of revenue and were not merely purchased by the universities "for their own use, i.e., for their libraries." Petitioner submits that this interpretation of the "institutional" exemption, limiting it to the purchase of *non-competitive supplies*, is proper and that the decision of the Court of Appeals in the present case is in conflict with the *Students Book Company* decision.

Public use of university athletic and recreational facilities has, in analogous cases, deprived a university of a tax exemption almost identical in language to that of Section 13c. See *Trustees of Rutgers University v. Piscataway*, 46 A.2d 56 (N.J. 1956); and *In re White's Will*, 195 N.Y.

S.2d 349 (1959). When a bowling alley and other recreational facilities contained in a Student Union Building are restricted in use and purpose *exclusively* to university personnel and educational purposes, such an exemption is not lost. *People v. University of Illinois Foundation,* 58 N.E. 2d 33 (Ill. 1944).

C. Application of the Exemption Could Not Properly Be Determined While a Fact Issue Remained as to the Degree of Public Use of the Recreational Facilities.

Although not allowed discovery on the subject, petitioner by affidavit raised a substantial and genuine issue of material fact in this case regarding the extent of public use of the recreational facilities involved. (R. 55-64). Those affidavits demonstrate conclusively that the university bowling alleys and other facilities were used by the general public, that the university made no attempt to limit those facilities to its "own use" and that, to the contrary, the facilities were used in at least a semi-public manner in direct competition with the facilities of petitioner.

No single issue of fact in this case could be more material in determining whether the exemption should or should not apply than the issue of public use of the recreational facilities involved. Yet the Court of Appeals dismissed the clear issue of fact in the record on this matter as *immaterial.* (Appendix A, p. 7). To sustain a Summary Judgment in the face of an issue of fact on such a critical matter is obvious error.

The respondent's argument that the university facilities involved in this case were not used in competition with those of petitioner for the patronage of the general public, and are therefore entitled to the benefit of exemption under Section 13c, plainly denies reality. One need look only to the economic consequence of the price discriminations

practiced by Brunswick to determine whether the university bowling alleys were truly in competition with petitioner. Petitioner's business has been destroyed just as surely by this favored institutional competitor as it would have been by a favored commercial competitor.

II. PETITIONER'S ACTION ENCOMPASSED NUMEROUS OTHER DISCRIMINATORY SALES IN INTERSTATE COMMERCE WHICH WERE IGNORED BY THE DISTRICT COURT AND THE COURT OF APPEALS.

In its Amended Complaint in this matter, petitioner charged the respondent Brunswick in general terms with violations of the antitrust laws of the United States and more particularly with price discriminations in violation of Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13(a)). (R. 43-52). *In so doing, petitioner did not confine its charges of discriminatory sales to those transactions involving the Utah State University.* Petitioner clearly charged Brunswick with other discriminatory sales in interstate commerce which did not and could not have fallen within the so-called "institutional" exemption upon which the decision of the Court of Appeals was based nor the "governmental" exemption upon which the District Court alternatively grounded its decision. (R. 43. See particularly paras. 7, 10, 12 and 13 of the Amended Complaint). *Both the District Court and the Court of Appeals have plainly ignored the fact that petitioner plead and sought to prosecute such other discriminations.*

At the very time Summary Judgment was granted, the District Court had before it certain discovery requests of petitioner for information regarding discriminatory sales by Brunswick in interstate commerce to favored purchasers

other than the State of Utah or the Utah State University. (R. 15-19, 38-42, and 65). By its Interrogatories Nos. 52 to 58 incl., petitioner specifically requested that Brunswick set forth the sales price and other information on each of its interstate sales of bowling equipment to customers in northern Utah and southern Idaho during the period 1958-64. (R. 16 and 18). Such territorial price information as petitioner was seeking is clearly relevant to a claim against an interstate seller under the Robinson-Patman Act. *Utah Pie Co. v. Continental Baking Co., et. al,* 87 S.Ct. 1326 (1967).

When petitioner's interrogatories were not timely answered by Brunswick, petitioner moved the lower court for an order compelling answers thereto. (R. 38). Although already in default on its answers, Brunswick filed a motion for an extension of time within which to answer the interrogatories. (R. 36). In an incredible display of judicial anxiety, the District Court denied petitioner's motion and allowed Brunswick an extension of time for answering the petitioner's interrogatories until ten days *after* a ruling on Brunswick's motion to dismiss. (R. 65). In so doing, the Court commented that "if it makes some difference on the motion to dismiss, that is too bad." (R., Vol. II, Reporter's Transcript of Proceedings, May 20, 1966, at page 7). The District Court then proceeded to hear and grant Brunswick's motion to dismiss, later treated as a Motion for Summary Judgment. (R. 98-103).

It was clear error for the District Court to grant Summary Judgment for the respondent as to the entire action based upon a consideration of only *one* of the discriminatory transactions charged. (R. 98-103). That error is compounded by the fact that the Summary Judgment was granted in the face of, and while the court *held in abeyance*

petitioner's discovery demands for information regarding other discriminatory sales by Brunswick, the development of which would have rendered Summary Judgment in this matter unthinkable. The rulings of the lower court on those discovery demands unduly restricted the scope of petitioner's case and deprived it of an opportunity to demonstrate the existence of numerous material issues of fact. The prejudice to petitioner of those discovery rulings cannot be overstated.

After entry of the Summary Judgment herein, petitioner *separately* appealed from that judgment and from the Orders of the District Court with respect to those discovery matters encompassing other areas, other customers, and other price discriminations. (R. 105). In its Statement of Points on Appeal, petitioner expressly raised the error of the lower court with respect to these other matters (R. 114-115), but the Court of Appeals either refused to consider those points without comment or completely disregarded them.

III. SUMMARY JUDGMENT AGAINST AN ANTITRUST TREBLE DAMAGE CLAIMANT WHICH HAS NOT BEEN ALLOWED DISCOVERY IS WHOLLY IMPROPER.

This Court has held that a private treble-damage claimant should not be deprived of a jury trial by Summary Judgment in an antitrust case where "... motive and intent play leading roles . . . and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962). Summary Judgment should be granted sparingly in antitrust cases, *Poller v. Columbia, supra; White Motor Co. v. United States,* 372 U.S. 253 (1963) and is inappropriate where the plaintiff has not been afforded

a full opportunity to formulate his charges. *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 339 (4th Cir. 1959); *Waldron v. British Petroleum Co.*, 231 F.Supp. 72 (D. N.Y. 1964); *Curto's, Inc. v. Krich - New Jersey, Inc.*, 193 F.Supp. 235, 238 (D. N.J. 1961); and *Philco Corp. v. Radio Corporation of America*, 34 F.R.D. 453 (E.D. Pa. 1964).

The action of the District Court in this case in granting Summary Judgment for respondent while holding in abeyance petitioner's initial discovery demands is in outrageous discord with the above authorities and the affirmation of that action by the Court of Appeals demands a review by this Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in this case is the first federal appellate court decision to apply the "institutional" exemption of Section 13c of the Robinson-Patman Act (15 U.S.C. §13c (1938)), and the Court of Appeals in its decision erroneously construed this federal law in a number of important respects.

2. This case presents the Court with the opportunity to define the scope and proper application of the "institutional" exemption of the Robinson-Patman Act (15 U.S.C. §13c, (1938)), important matters of federal law which have not been, but should be, settled by this Court.

3. The decision of the Court of Appeals for the Ninth Circuit in this case is in conflict with the decision of the Court of Appeals for the District of Columbia in *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (1955), *cert. denied*, 350 U.S. 988 (1956).

4. In affirming a Summary Judgment against a private treble-damage claimant under the federal antitrust laws without allowing that claimaint any discovery, the Court of Appeals in this case has so far departed from accepted judicial procedure and from previous decisions of this Court in cases of this nature as to call for an exercise of this Court's supervision.

CONCLUSION

For the foregoing reasons the petition for a Writ of Certiorari should be granted.

Dated: August 1, 1967.

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RICHARD W. GIAUQUE

Attorneys for Petitioner

(Appendices A, B, C and D Follow)

Appendix A

LOGAN LANES, INC., an Idaho Corporation, *Appellant*, vs. BRUNSWICK CORPORATION, a Delaware Corporation, *Appellee*.	No. 21,168

(May 5, 1967)

Appeal from the United States District Court for the District of Idaho, Eastern Division

Before: POPE, HAMLEY and BROWNING, Circuit Judges

HAMLEY, Circuit Judge.

This is a suit brought by Logan Lanes, Inc. to recover treble damages in the sum of approximately $600,000 from Brunswick Corporation (Brunswick) for the alleged violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (Act), 49 Stat. 1526 (1936), 15 U.S.C. §13(a) (1964).[1] It arises from a sale of bowling lanes and related equipment by Brunswick to Utah State Building Board (Board), at lower prices than Brunswick charged plaintiff Logan Lanes, Inc., for similar equipment. The Board is an agency of the State of Utah. The district court granted summary judgment for Brunswick, and Logan Lanes appeals.

In its amended complaint, Logan Lanes made the following allegations of fact, among others: Brunswick is en-

[1] In its brief in this court, Logan Lanes also invokes section 2(c), (d) and (e), but we find nothing in the allegations of the amended complaint which would bring these subsections into play.

gaged in the manufacture and sale, in interstate commerce, of bowling lanes and equipment. Logan Lanes operates an establishment for bowling and billiards in Cache County, Utah. On October 5, 1959, Logan Lanes purchased from Brunswick sixteen bowling lanes and necessary related equipment, for a cash price of $13,091.00 per lane.

Logan Lanes further alleged that, in March and April, 1964, Brunswick sold ten bowling lanes and related equipment of like grade and quality to the Board in the same county and state for $8,111.86 per lane. The bowling lanes and equipment sold to the Board were used in competition with Logan Lanes. Since 1964, Brunswick has continued to sell bowling equipment to the Board at a discount at from 17½ to twenty-five percent under the prices Brunswick charges Logan Lanes for similar equipment.

As a result of the indicated discrimination in prices, Logan Lanes alleged, it has not been able to compete successfully with the operation using the bowling lanes sold to the Board, because Logan Lanes must charge a higher fee for using its lanes. Consequently, the company alleged, it has sustained a loss of at least $200,282.78 which, trebled, amounts to $600,848.34.

Brunswick moved to dismiss the action upon the ground that the amended complaint failed to state a claim upon which relief can be granted. In opposition to the motion to dismiss, Logan Lanes filed six affidavits, and in support of the moton Brunswick filed three affidavits and several exhibits.

A number of additional facts are to be gleaned from the affidavits and exhibits. The bowling equipment purchased by the Board was installed in the Student Union Building on the Utah State University campus at Logan, Utah. The

bowling facilities were primarily for the use of students, faculty and staff of the Universtiy, but were also used by members of the public. One use the students make of such bowling equipment is to fulfill physical education requirements at the University. All income from the Student Union bowling alleys is used to finance student activity programs, or goes into a fund for expansion and improvement of the University.

Members of a University bowling league using the Student Union bowling alleys were charged the student rate, which is one dollar for three games, as compared to $1.35 for three games at Logan Lanes' bowling alley. The management of the Student Union lanes has declined to limit use of that equipment to persons associated with the University.

An affidavit submitted by Brunswick asserts that from July, 1964, when the new lanes were installed, to March 31, 1966, there were 128,349 lines bowled at the Student Union. Of these, according to this affidavit, 125,415 were bowled by student, faculty, staff and guests, while 2,934 were bowled by others. According to affidavits submitted by Logan Lanes however, no effort was made at the Student Union lanes to determine whether prospective customers were associated with the University.

In view of these affidavits and other materials filed in connection with the motion to dismiss, none of which were excluded, the trial court properly regarded the motion as one for summary judgment for defendant Brunswick.[2] Ruling that there was no genuine issue as to any material fact, the court granted Brunswick's motion to dismiss on these alternative grounds: (1) Brunswick's sale of bowling lanes and equipment to the Board is exempt from the applica-

tion of section 2(a) of the Act, 49 Stat. 1526 (1936), 15 U.S.C. §13(a) (1964),[3] pertaining to price discrimination, because that section was not intended to apply to sales made to a state; and (2) the sale in question is exempt from the application of section 2(a), because the Board's purchase of this equipment was a purchase of supplies for its own use by a university not operated for profit, within the meaning of 52 Stat. 446 (1938), 15 U.S.C. §13c (1964).[4]

Logan Lanes questions each of these grounds.

We consider first whether summary judgment for Brunswick was correctly granted on the latter ground, namely, that by reason of the 1938 statute exempting from the operation of the Act, certain purchases by universities and other non-profit institutions, these sales by Brunswick to the Board are exempt from the operation of section 2(a) of the Act.

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[2]See Rule 12(b), Federal Rules of Civil Procedure; *Erlich v. Glasner*, 9 Cir., ... F.2d ....., decided March 23, 1967.

[3]"**§13 Discrimination in price, services, or facilities — Price; selection of customers**

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, whether either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

---

[4]The 1938 statute, as it appears in 52 Stat. 446, reads as follows: "That nothing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

Logan Lanes argues that since this statute refers to "purchases" of supplies, this might imply that Congress meant to limit the exemption to the purchasing party, and not extend it to the party selling the goods to a non-profit institution.

For every purchase, however, there must be both a purchaser and a seller. It follows that if a particular purchase is exempt from the Act, both the seller and purchaser involved in that transaction are exempt. Moreover, the benefits in the form of lower prices which are expected to accrue to non-profit institutions by reason of this statute would be illusory if only the purchasing institution, but not the sellers thereto, were exempted. No seller would be able to give a non-profit institution the benefit of a lower price which was discriminatory under the Act, if such seller was not exempt from the sanctions of the Act in making the sale.

Logan Lanes also contends that "supplies" as used in the 1938 statute, means only items of stock, materials and provisions needed to carry on daily operations, and does not include such capital items as bowling lanes.

The word "supplies," as used in this statute, is not defined. In general usage the term is sometimes meant to apply in a restricted sense. As an example, the term may be used to designate substances that are consumed with their use, and which do not enter into, and become a physical part of, a finished product.

As used in this statute, however, we think the term "supplies" is used in a more general sense. It embraces anything required to meet the institution's needs, whether it is consumed or otherwise disposed of, or whether it constitutes, or becomes part of, a material object utilized to enable the institution to carry on its activities.

We reach this conclusion because we perceive no reason why, in granting such an exemption to nonprofit institutions, Congress would wish to distinguish between purchased articles which are to be consumed, and those which are not. The underlying intent of granting such an exemption was undoubtedly to permit institutions which are not in business for a profit to operate as inexpensively as possible. This intent would be substantially thwarted if the term "supplies" was given the restricted construction urged by Logan Lanes. It is axiomatic that courts strive to adopt that construction of a statute which best effectuates the legislative purpose. See *Reich v. Webb*, 9 Cir., 336 F.2d 153, 157.

Logan Lanes further asserts that there are genuine issues of material fact under the 1938 statute as to whether the purchases in question were made: (1) by a university not operated for profit, and (2) for its "own use." These respective questions, Logan Lanes states, arise: (1) because the materials purchased are used in a student-union building which may be self-sustaining and which may not be a part of the university, and (2) because, to an extent not clearly established in the pleadings and affidavits, the bowling equipment is used by members of the public. Logan Lanes argues, therefore, that a summary judgment should not have been entered by the district court because there were genuine issues as to material facts. See Rule 56(c) Federal Rules of Civil Procedure.

Our review of the record convinces us that there is no genuine issue of material fact as to these matters. It is undisputed that the Student Union Building is on the campus of Utah State University, that the bowling facilities are used by the students, faculty and staff of the Unversity, and that one use the students make of this equipment is to fulfill physical education requirements at the University.

It is also undisputed that all net income from these bowling alleys is used to finance student activity programs or the expansion and improvement of the University. Logan Lanes does not contend that any excess of revenue over expenses resulting from the operation of the bowling alleys, or of any other activity conducted in the Student Union Building or elsewhere on the campus, is distributed to any private person or company as a profit.

The only genuine issue of fact which appears to be in the case concerns the exact amount of public use of the bowling lanes. As noted above, Brunswick has presented affidavits tending to show that 125,415 lines were bowled by students, faculty, staff and guests, while 2,934 lines were bowled by members of the public. Logan Lanes, on the other hand, has presented affidavits tending to show that no effort was made at the Student Union lanes to determine which customers were members of the public and which were not.

In view of all of the other circumstances referred to above, as to which there is no genuine issue of fact, we do not believe that the issue of fact concerning the exact amount of public use of the bowling lanes is material. Assuming that the public made substantial use of the University bowling facilities, we would still conclude that, within the meaning of the 1938 statute, the purchases in question were made by a university not operated for profit, for its own use.

The primary purpose of the purchases, established beyond dispute, was to fulfill the needs of the University in providing bowling facilities for its students, faculty and staff. This being the case, any additional use of the bowling facilities by the general public for a fee, even if such use is substantial, would not establish that the purchases were

made for the use of the University. This is true because to the extent that the facilities are used by persons other than students, faculty and staff, the net proceeds of such additional use are utilized exclusively for University purposes.

Logan Lanes suggests that the purchases in question may not have been made for the University, but for a self-sustaining student activity carried on in the Student Union Building, and that this can be determined only by a full development of the facts. *Student Book Company v. Washington Law Book Company,* D.C. Cir., 232 F.2d 49, is cited in support of this view.

That case involved an alleged price discrimination by the defendant, a law book publishing company, in selling law books to self-sustaining campus book stores at preferential prices as compared to the prices it charged the plaintiff, a privately operated retail book store. The court held that sales to self-sustaining campus book stores for resale at a profit are not sales to universities for the use of the universities within the meaning of section 13c of the Act. 232 F.2d at 50, n. 5.[5] In our case, however, it is undisputed that the bowling lanes installed in the Student Union are used as part of the University's physical education program and are also used as recreational facilities for the students, faculty and staff. We think the case before us is distinguishable from the *Student Book Company* case.

We conclude that the district court did not err in granting summary judgment for Brunswick on the basis of the university exemption set out in the 1938 statute. We therefore do not reach the question of whether the so-called governmental exemption also provides a sufficient basis for granting summary judgment.

Affirmed.

[5]The defendant nevertheless prevailed on another ground.

Appendix B

MEMORANDUM OF OPINION

Plaintiff brought this action under and pursuant to Title 15 U.S.C. Sections 13 and 15. The cause is presently before the court on defendant's motion to dismiss alleging that that complaint fails to state a claim upon which relief can be granted. The parties have submitted affidavits and briefs in support of their respective contentions. On May 20, 1966, the court heard oral argument of counsel on said motion and the matter was submitted for consideration.

Since it does not appear that there is a genuine issue of fact in regard to the principal questions presented, counsel have treated and the court shall consider the motion to dismiss as a motion for summary judgment as authorized under Rule 12 of the Federal Rules of Civil Procedure.

It is agreed that plaintiff has been and still is in the business of operating public bowling lanes; that on or about October 5, 1959, it entered into a contract with the defendant to purchase certain bowling machinery and supplies to be used in plaintiff's business; that since that time plaintiff has annually purchased supplies from the defendant; that on or about March and April of 1964, the defendant sold simliar machinery and supplies to the Utah State Building Board at a lower unit price than the price for which defendant sold similar machinery and supplies to the plaintiff. Plaintiff alleges and claims that said machinery and supplies purchased by the Utah State Building Board were being used in competition with the plaintiff.

At the hearing on the motion, counsel for plaintiff readily admitted that the Utah State Building Board is a govern-

mental body acting in behalf of the State of Utah, and, that the machinery and supplies procured by said body was for the Utah State University located in the same county as the plaintiff's business.

It appears that said machinery and supplies acquired by the Utah State Building Board were placed in a building at the Utah State University which is owned by said University through its governing board known as the Board of Trustees. It is admitted that the bowling and recreation facilities located in the Union Building at the University are used in the physical education program of the school and that, in addition, the students and faculty are allowed to use the facilities. It is indicated that a small percentage of the public uses said facilities for bowling. The income from the school's bowling alley and game room is used, together with other revenue from the Union Building, to finance activity programs for the students and any surplus money remaining after financing this activity is placed in a Dormitory-Union Building Reserve Account for expansion and improvement.

Plaintiff urges that the defendant has violated Title 15 U.S.C.A. §13(a), (c), (d), and (e), commonly referred to as a part of the Robinson-Patman Act. Since plaintiff has not alleged and does not claim a sale for resale, concealed brokerage or commission payments, or payments for promotional activities, there is no merit to the contention of a violation of subsections (c), (d), and (e). The only contention that may have any merit is the claim in regard to a violation of subsection (a) of the Act.

Title 15 U.S.C.A. §13(a) provides, in part, as follows:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either di-

rectly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *"

The principal question is whether a sale to a sovereign, here the State of Utah, renders the seller immune from actions brought pursuant to Title 15 U.S.C.A. §13(a) of the Robinson-Patman Act. There have been very few cases in which this problem has arisen. These cases appear to stand for the proposition that the Robinson-Patman Act does not apply to sales to a sovereign. See *Sperry Rand Corp. v. Nassau Research & Development Associates, Inc.*, 152 F. Supp. 91, 96 (E.D.N.Y. 1957); *Sachs v. Brown-Forman Distillers Corp.*, 134 F.Supp. 9, 16 (S.D.N.Y. 1955), aff'd per curiam 234 F.2d 959 (2nd Cir. 1956); *General Shale Products Corp. v. Struck Construction Co.*, 37 F. Supp. 598, 602-603 (W.D. Ky. 1941), aff'd on other grounds 132 F.2d 425 (6th Cir. 1942). In the case of *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (1965), the 9th Circuit Court of Appeals, in affirming a case arising in the State of Idaho, after considering the authorities presently before this court, stated on pages 858-859 as follows:

"Defendants also argue, with regard to the general applicability of section 2(c), that sales to a sovereign are excluded, and hence payments made to Grimes in connection with Rangen's sales to the State of Idaho are not covered by that subsection. Several district courts have apparently so ruled, on the theory that

such an exemption is required by the policy which allows the sovereign to buy at the best price obtainable.

"Assuming that there is such a policy and that it gives rise to such an exemption in an appropriate case, it has no room to operate here."

It is noted that the foregoing case dealt with the problem of "commercial bribery" while the case presently before this court is one of an alleged price discrimination. This court is of the opinion that the case here exemplifies the right of a sovereign to make purchases at the best price possible regardless of the price which the same or similar products may be sold to the public. If this should not be the correct observation, then the implications in denying such immunity shall have far reaching effect on the present day governmental purchasing procedures. It is common knowledge that a sovereign does bargain for the best price obtainable. This court is of the opinion that under the admitted facts of the case here, the sale to the sovereign State of Utah does not come within the provisions of the Robinson-Patman Act.

If it is assumed that a sale to a sovereign is subject to the provisions of the Robinson-Patman Act, then the question arises as to whether the defendant would be entitled to the exemption as provided in Title 15 U.S.C.A. §13(c) which provides as follows:

"Nothing in sections 13-13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities * * * not operated for profit."

It is clear from the facts in this case that the bowling and recreational facilities in the Union Building at the University were purchased, operated and maintained primarily for the benefit of the school and the students there in attendance; that any profit or income arising from the operation of said facilities is purely incidental to the University's programs. Obviously, the Universty is not operated for profit. Under the facts in this case, this court is of the opinion that the defendant would be entitled to the exemption afforded by Title 15 U.S.C.A. §13c.

Since this court has expressed its opinion in regard to the two principal questions presented, it is not necessary to consider the question whether the sales alleged in the complaint are contemporaneous, or proximate in time, so as to bring them within the purview of the alleged price discrimination.

Accordingly, it is Order that defendant's motion be, and the same hereby is, granted.

Counsel for the defendant shall prepare a proposed Judgment, submit a copy thereof to counsel for the plaintiff and the original to the court.

Dated at Boise, Idaho, this 26th day of May, 1966.

FRED M. TAYLOR
United States District Judge

Appendix C

Section 2 of the Clayton Act, 38 Stat. 731 §2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, §1 (1936), 15 U.S.C. §13 (1952).

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing

shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for serv-

ices rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

The 1938 amendment to the Robinson-Patman Act, 52 Stat. 446 (1938), 15 U.S.C. 13(c) (1964).

> "That nothing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Anti-discrimination Act, shall apply to purchases of their supplies, for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

Section 4 of the Clayton Act, 38 Stat. 731, §4 (1914), 15 U.S.C. §15 (1952).

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Appendix D

MR. LLOYD. Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

MR. TEEGARDEN. Not unless the present Clayton Act does so. So far as that problem is concerned, it is no different from that which exists under the present Clayton Act.

MR. LLOYD. For instance, the Government gets huge discounts. Take that electric fan, for instance. You go to the ordinary store and the list price is $35. The Procurement Division procures them delivered, one at a time, for $13.18. Now, would that discount be barred by this bill?

MR. TEEGARDEN. I do not see why it should, unless a discount contrary to the present bill would be barred — that is, the present law — would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition with other buyers from these concerns.* Therefore a discrimination — it is so applied universally in interstate commerce law, in the railroad law — *to have a discrimination, there must be a relative position between the parties to the discrimination whch constitutes an injury to one as against the other. I think the answer is to be found in that.*

In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

The Federal Government is saved by the same distinction, not of location but of function. They are not in competition with anyone else who would buy.

MR. HANCOCK. It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

MR. TEEGARDEN. You mean competitive bidding on Government orders?

MR. HANCOCK. Government, State, city, municipality.

MR. TEEGARDEN. No; I think not.

MR. MICHENER. If it did do it, you would not want it, would you?

MR. TEEGARDEN. No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

MR. HANCOCK. You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

MR. TEEGARDEN. No.

MR. HANCOCK. Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

MR. TEEGARDEN. I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.* (Emphasis added)

SUPREME COURT, U. S.

FILED
AUG 28 1967
JOHN F. DAVIS, CLERK

No. 450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

LOGAN LANES, INC.,

Petitioner,

v.

BRUNSWICK CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATUTE INVOLVED

The statutory provision involved is Section 13c of the Robinson-Patman Act, 52 Stat. 446 (1938), 15 U.S.C. § 13c, which reads as follows:

> "That nothing in the Act approved June 19, 1936 (Public, Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Antidis-

crimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

QUESTION PRESENTED

Respondent Brunswick sold bowling equipment to Utah State University for use in its Student Union Building at lower prices than to petitioner, a private bowling operator in the same town. The only substantive question presented is whether the above quoted amendment to the Robinson-Patman Act applies when, although the Student Union bowling lanes are used principally for University purposes, the University also permits members of the public to bowl on them.

STATEMENT

The facts of the case are not set forth in the petition for certiorari. They appear in the complaint and the affidavits and exhibits submitted in reference to respondent's motion for summary judgment. Petitioner has not challenged anything said in the summaries of the facts set forth in the opinions of the District Court and the Courts of Appeals appended to the petition.

In short, respondent Brunswick sold bowling lanes, automatic pinsetters, and related equipment to petitioner in 1959 at a higher price than to Utah State University for incorporation in its Student Union Building in 1964.[1]

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[1] The sale of the lanes and pinsetters to the University, through the State Building Board, was pursuant to a request for bids, as required by Utah Statutes, Chapter 10-7, Section 63. See R. 86-88; Ex. B.

Other bowling supplies were also allegedly sold to petitioner and the University on the same basis thereafter. Both petitioner and the University are located in Logan, Utah.

The bowling lanes are used by the University in its physical education program. Approximately 900 to 1,000 students annually enroll in bowling classes for which they receive credit. (R. 92, 94.) The bowling lanes also provide extracurricular recreation for students and faculty. (R. 92.) In addition, the University permits the general public to use its bowling facilities. All income from the Student Union bowling alleys is used to finance student activity programs, or goes into a fund for expansion and improvement of the University. (Pet. App. 3; R. 92-93.)

An affidavit submitted by the manager of the Student Union Building states that of 128,349 lines bowled between July, 1964, when the new lanes were installed, and March 31, 1966, 125,415 were bowled by students, faculty, staff and guests, and 2,934 were bowled by others. (Pet. App. 3; R. 94.) Affidavits submitted by petitioner confirm that the Student Union lanes were used by the public, without giving figures as to the proportion of such use, and also state that deponents believe that no effort was made at the Student Union to determine whether prospective customers were associated with the University. (Pet. App. 3; R. 55-64.)

Petitioner's amended complaint (R. 43) alleged that because the University paid less for its bowling equipment, it could and did charge lower rates to bowlers than petitioner, that petitioner had lost business because of the price discrimination, and that the discrimination in price was a violation of the Robinson-Patman Act. Damages of $200,000, trebled to $600,000, were sought. (R. 52.)

The District Court granted respondent's motion for summary judgment on the grounds both that the Robinson-Patman Act did not apply to sales to a sovereign state, and that the sales to the State University were in any event exempted from the Act by Section 13c. (Pet. App. 9-13.) The Court of Appeals affirmed on the latter ground. (Pet. App. 1-8.)

ARGUMENT

1. The Decision Of The Court Of Appeals Is Plainly Correct.

The decision below clearly comports with the language of the 1938 amendment incorporated in Section 13c of the Robinson-Patman Act, which provides that the Act shall not apply to "purchase of their own supplies for their own use by . . . universities . . . not operated for profit." Indeed, the petition makes no effort to show that the words of the exemption are inapplicable.

The contention seems to be that, if the price discrimination in favor of a university causes substantial competitive injury to a private enterprise, the exemption does not apply. Nothing in the language of the statute, nor for that matter in the passages quoted on page 6 of the petition from the committee reports, supports that reading. These excerpts from the reports show an intent to exempt "eleemosynary institutions, as they are not operated for profit." See Sen. Rept. No. 1769, 75th Cong., 3rd Sess. (1938), as quoted on page 6 of the petition. Indeed the passage quoted (p. 6) from House Report No. 2161, 75th Cong., 3rd Sess., explains that the amendment was designed to insure "that favors in price which are occasionally extended to eleemosynary institutions, because of the character of the institution, do not fall under the ban of the act." There is no suggestion that such "favors in price" were not to be allowed whenever a private competitor might be affected, so long as the institution was of the character—"charitable" and "non-profit"—covered by the amendment.

The colloquy in the 1935 hearing on the bill which became the Robinson-Patman Act of 1936, upon which the petition relies (Pet. 6), occurred three years *before* enactment of the amendment exempting purchases by universities.

Many charitable institutions whose purchases were exempted from the Robinson-Patman Act by the 1938 amendment engage in activities which compete to some extent with private enterprise. School dormitories may compete with private housing facilities; school rooms used in the evening for community meetings compete in certain communities with private meeting rooms; charitable hospitals may compete with other hospitals. On petitioner's theory, in these situations the school or hospital could not continue to obtain "favors in price" in sales of beds and other furniture for the dormitories and the hospitals, or of desks and chairs for the classrooms used in the evening for private meetings. If Congress had intended anything like that it would have put words to that effect in Section 13c instead of using language which does not permit of such a construction.

It may be noted that in transactions of this sort, the sale to the exempted institution may occur before the product is used in a way which might harm private competitors. It would neither be fair nor feasible to bar a seller from granting the charitable institution the discount validated by Section 13c because subsequently it appeared that a competitor was adversely affected by the way in which the product was used. To be specific, when the Utah State Building Board called for bids on bowling equipment to be installed in a State University building, Brunswick

would not have known whether the public generally would be permitted to use the facilities after they were installed.

The petitioner argues (p. 8) that its affidavits raised an issue of material fact, since they established that the University bowling "facilities were used by the general public", that they were not limited to the University's own people, but were operated in "direct competition with the facilities of petitioner." All this was admitted. As the Court of Appeals' opinion makes clear, the only area of factual dispute concerned the precise amount of public use of the University alleys. The affidavit of a University official indicated it was under three per cent. (R. 94). Petitioner's affidavits tended, at most, to show that "no effort was made at the Student Union lanes to determine which customers were members of the public and which were not." (Pet. App. 7.) The Court of Appeals properly found (Pet. App. 7-8) that since "the primary purpose of the purchases, established beyond dispute, was to fulfill the needs of the University in providing bowling facilities for its students, faculty and staff," "any additional use of the bowling facilities by the general public for a fee, even if such use is substantial, would not establish that the purchases were *not*[2] made for the use of the University." In view of the substantiality of University use, and the fact that the proceeds of use by others went "exclusively for University purposes," the Court of Appeals correctly con-

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[2] This word was inadvertently omitted from the opinion as quoted in the appendix to the petition, pp. 7-8.

cluded (Pet. App. 7-8) that the exact amount of bowling by other than University people was immaterial.[3]

The petition refers to the history of the original Robinson-Patman Act of 1936 (prior to the 1938 amendment) as demonstrating that sales to the government were to be exempt "only to the extent that the goods purchased were used by the government for its own purposes and not in competition with private concerns." (Pet. 6.) Since the Court of Appeals did not find it necessary to consider our argument that the Act was never intended to bar discounts to governments, we shall not dwell on the point here. It should be sufficient to cite Representative Patman, whose book (*The Robinson-Patman Act* (1938), p. 168) contained the following question and answer:

> "Question. If a manufacturer sells to government, municipal, or public institutions at a lower price than he sells to his wholesale customers, is he in violation of the law if he does not make the same price for the

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[3]Although state tax cases are obviously not controlling, *People* v. *University of Illinois Foundation*, 388 Ill. 363, 367, 370, 58 N.E.2d 33, 36-37 (1944), cited in the petition (p. 8), involves very similar facts, and clearly supports respondent's position rather than petitioner's. In that case the Student Union Building containing bowling alleys "occasionally used . . . by members of the public" was held exempt from taxation under a statute exempting property "used by such schools exclusively for school purposes", on the ground that the "primary" and not the "secondary or incidental use, is controlling." The petition errs in stating that the bowling alleys in the Illinois Student Union building were confined "exclusively to university personnel and educational purposes." Indeed, the three per cent "public use" of the Student Union facilities in Illinois (388 Ill. at 367) is almost identical with that of the University bowling alleys in the case at bar.

same quantity available to the wholesaler to whom he sells?

> "*Opinion.* The Attorney General of the United States has ruled that the Act does not apply to the government. (See Chapter 18.) It may be presumed that the Attorney General's reasons may also be applied to municipal, and public institutions."

Dissatisfied with this result, in 1951 and 1953 Representative Patman introduced bills (H.R. 4452, 82nd, Cong., 1st Sess., and H.R. 3377, 83rd. Cong., 1st Sess.) the stated purpose of which was:

> "To amend section 2 of the Clayton Act so as to make it applicable to discriminatory sales to the United States and to any State, or political subdivision thereof."

These bills would have amended the Act to provide:

> "That for the purpose of this section the term 'purchaser' includes the United States, any State or any political subdivision thereof."

The bills were never enacted. Thereafter in the 1963 edition of his book (entitled *Complete Guide to the Robinson-Patman Act*), Representative Patman gave substantially the same answer as he had in 1938 (p. 30).

Since Representative Patman, who was the principal legislative sponsor of the Robinson-Patman Act, would not likely have understated the Act's coverage, these manifestations of his understanding that the Act does not apply to sales to State governments are entitled to weight.

II. There Is No Conflict Of Decisions.

The decision below does not conflict with a dictum in a footnote in *Students Book Company* v. *Washington Law Book Co.*, 232 F.2d 49 (C.A.D.C., 1955), the only other case

in 29 years which has interpreted Section 13c. The Court of Appeals for the District of Columbia there sustained a jury verdict that the Robinson-Patman Act had *not* been violated by the defendant, on the ground that campus book stores were not purchasers of law books but only agents to whom the books were consigned on a commission basis. Footnote 5, after quoting Section 13c, stated:

> "Although the appellee has sold books to all three of the universities for their own use, i. e., for their libraries, the transactions here in question were not actually with the universities, but with the self-sustaining campus book stores, and the books sold were not for the use of the universities, but for resale at a profit. The exemption provision is therefore inapplicable to these transactions."[4]

Whereas in the *Students Book* case the books were not used by the university but sold at a profit to be used by others, here the bowling equipment was unquestionably sold to the University to be used as part of its physical education program. The record establishes that merchandise resold at the University alleys was not purchased from Brunswick. (R. 95.) The Court of Appeals correctly found the *Students Book* case distinguishable. Obviously there is no such disagreement between two circuits as to require resolution by this Court.

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[4] Nothing in the opinion of the Court of Appeals in the *Students Book* case supports petitioner's statement that the issue treated in footnote 5 was in any way affected by "a full development of the facts by discovery and jury trial". (Pet. 7.) The discussion of facts in the *Student Book* case was concerned entirely with the jury's determination of the sale-consignment issue.

III. Petitioner's Claim That The Case Involves Other Discriminatory Sales Was Not Raised In The Court Of Appeals And Is In Any Event Without Merit.

The petition argues (p. 9) that the Court of Appeals ignored its claim that sales by Brunswick to others than the State University violated the Robinson-Patman Act. Petitioner presented no such question to the Court of Appeals. Its briefs below dealt only with sales to the University and the effect of this upon petitioner. Its main brief complained (p. 9) that appellee (Brunswick) sold at lower prices "to this competitor of appellant."

"Only in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362 n. and cases there cited; *California* v. *Taylor*, 353 U.S. 553, 557 n. There is nothing exceptional here.

A fair reading of petitioner's amended complaint (including particularly paragraphs 7, 10, 12 and 13 cited on page 9 of the petition and found at R. 45-47) will demonstrate that petitioner was claiming injury from Brunswick's sales at a lower price only to "this competitor" or to "such competitor", in the singular, with obvious reference in context to the Student Union Building of the University. (R. 47.) And the affidavits submitted by petitioner in opposition to respondent's motion for summary judgment dealt only with the Student Union bowling lanes. (R. 55-64.) Thus, not only did petitioner's counsel fail to raise the point in the Court of Appeals, but in addition the point was not even raised on the record in the trial court.

The requests in petitioner's interrogatories (R. 18) for information as to respondent's prices in all other sales to customers in northern Utah and southern Idaho may con-

ceivably have been relevant to knowledge of respondent's price structure in the area, but that would not enlarge the cause of action pleaded. Petitioner's officers would have known if bowling alleys other than the State University lanes were charging lower rates and thereby injuring it competitively. They undoubtedly would have so stated in their complaint or affidavits, if they had believed that any such injury was caused by Brunswick's price discrimination. There was no such intimation in anything said by them or their counsel in the courts below.

Petitioner is now asserting that the Court of Appeals erred, because, unasked, it did not remand the case with directions to the trial court to permit the plaintiff discovery broader than the cause of action pleaded.

IV. Summary Judgment Was Properly Granted.

Petitioner quotes cases which say (Pet. 11-12) that summary judgments should be granted sparingly in "complex antitrust litigation". *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473 (1962). But that policy does not apply to simple clear-cut cases such as this, where the material facts are undisputed and the case turns upon a narrow point of law. This is obviously *not* a case in which ". . . motive and intent play leading roles . . . and hostile witnesses thicken the plot". Cf. Pet. 11, quoting from the *Poller* case. Summary judgment is not to be precluded because of discovery demands which go far beyond anything the plaintiff has alleged in its complaint or asserted in its affidavits.[5]

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[5] None of the cases cited on pp. 11-12 of the petition involves the Robinson-Patman Act or issues as unencumbered by complex facts as is the case at bar.

Petitioner implies (p. 11) that the summary judgment deprived it of a jury trial. No jury trial was demanded, however, in the District Court.

CONCLUSION

The decision below was plainly right. There is no conflict of decisions. Indeed, there seems to have been no difficulty in giving effect to Section 13c; the question here involved has not arisen in any other case during the 29 years since the Section was enacted. No reason for granting certiorari has been shown. The petition should be denied.

Respectfully submitted,

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